IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-237

ALFRED A. GREENBERG,

Appellant,

vs.

STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Alfred A. Greenberg, the appellant, appeals from the final judgments of the Supreme Court of New Jersey dated May 15, 1979 dismissing claims that New Jersey's constitutional, statutory and local ordinance zoning scheme is unconstitutional under the Commerce and Supremacy clauses of the United States Constitution; that New Jersey Constitutional and Court rules abridging jury trial rights violate United States Constitution Amends. VI and XIV, and that New Jersey Court Rule 2:11-3(e)(2) violates Amends. VI and XIV of the United States Constitution.

OPINIONS BELOW

The opinions of the New Jersey Supreme Court are as yet unreported. They are attached hereto in the Appendix. The opinion of the Superior Court of New Jersey, Appellate Division is as yet unreported and is attached hereto in the Appendix.

JURISDICTION

The judgments of the New Jersey Supreme Court dismissing the appeal and denying Certification were entered May 15, 1979. A notice of appeal to this Court was docketed in the New Jersey Supreme Court on August 7, 1979. This appeal is being docketed in this Court within 90 days from the judgments below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether N.J. Const. Art. IV §6 ¶2 (1947), New Jersey Statute Tit. 40:55-30, Cranford Township Zoning Ordinance (1959) Art. 4 §24-17(b) and Art. 20 §24-81(a) violate Art. I Sec. 8 (Commerce Clause) and Art. VI, cl. 2 (Supremacy Clause) of the United States Constitution when applied to regulate the apparatus; dimensions and communications capability of a Federally licensed, lawfully operated amateur radio station.

2. Whether N.J. Court Rule 3:23-8(a) violates U.S. Const. Amends. VI (jury trial clause) and XIV §1 (due process clause) by prohibiting jury trials for persons exposed to imprisonment for 270 years.

3. Whether N.J. Const. Art. 6, §1 ¶2 (1947) and New Jersey Court Rule 2:10-5 violates U.S. Const. Amends. VI (jury trial clause) and XIV, §1 (due process clause) by authorizing state appellate courts to exercise original jurisdiction of issues triable of right by a jury.

4. Whether N.J. Court Rule 2:11-3(e)(2) violates U.S. Const. Amends. VI (public trial and assistance of counsel clauses) and XIV, §1 (due process and equal protection clauses) where the effect of such rule is to systematically attack counsel, allow trials without constitutionally-required judicial findings, prevent the construction of a record to protect Federal appeal rights, and provide the linchpin of a separate and unequal system of justice.

CONSTITUTIONAL PROVISIONS STATUTORY PROVISIONS, RULES AND INTERNATIONAL CONVENTIONS

U.S. Const. Art. 1 Sec. 8.

> The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States. . . .

U.S. Const. Art. VI cl. 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Amend. VI.

> In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV.

> §1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tit. 47 U.S.C. §303. Powers and Duties of Commission.

> . . . (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;
>
> (f) Make such regulations not inconsistent with law to prevent interference between stations and to carry out the provisions of this chapter. . . .
>
> • • •
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Tit. 47 U.S.C. §324. Use of Minimum Power.

> In all circumstances, except in the case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired.

Tit. 47 C.F.R. §97.1 Basis and Purpose . . .

> (e) Continuation and extension of the amateur's unique ability to enhance international good will.

Tit. 47 C.F.R. §97.77.

> "Practice to be observed by all licensees: In all respects not specifically covered by these regulations each amateur station shall be operated in accordance with good engineering and good amateur practice."

International Radio Regulations (1959) Ch. IV Art. 14 Section 1.

> §2. All stations shall radiate only as much power as is necessary to ensure a satisfactory service.
>
> §3. In order to avoid interference: . . . radiation in and reception from unnecessary directions shall be minimized where the nature of the service permits by taking the maximum practical advantage of the properties of directional antennae . . .

Art. 12.

> §2. Transmitting and receiving equipment intended to be used in a given part of the frequency spectrum should be designed to take into account the technical characteristics of equipment likely to be employed in neighboring parts of the spectrum.

N.J. Const. Art. IV §6 ¶2. Zoning Laws.

> . . . 2. The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

N.J. Statute Tit. 40:55-30. General Purposes and Powers.

> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the

nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. . . . The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings; and other structures . . . and the location and uses and extent of use of buildings and structures and land for trade, industry, residence, or other purposes.

Cranford Zoning Ordinance Art. 4, §24-17 (1959).

. . . (b) In the residential zones no accessory building or structure which is accessory to a residential use shall exceed 16 feet in height.

Cranford Zoning Ordinance Art. 20, §24-81 (1959).

. . . (a) No building or structure or part thereof shall be erected . . . . until a permit has been granted by the building inspector . . . .

N.J. Const. Art. VI §5 ¶3.

The Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review.

N.J. Court Rule 2:10-5. Original Jurisdiction.

The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review.

N.J. Court Rule 2:11-3.

• • •

(e) Affirmance without opinion.

• • •

(2) Criminal Appeals. When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

N.J. Court *Rule* 3:23-8. Hearing on Appeal.

(a) . . . If a verbatim record . . . was made . . . the appeal shall be heard de novo on the record unless . . . the rights of defendant were prejudiced below in which event there shall be a plenary trial de novo without a jury. The appellate court may also supplement the record and admit additional testimony. . . .

RAISING THE FEDERAL QUESTION

At the earliest stage of the proceedings, a pre-trial memorandum, and at the initial hearing in the Cranford Municipal Court, the appellant emphasized that the ordinance violation charged was enacted pursuant to state organic law and that the use of this authority to enact ordinances regulating the apparatus of a federally-licensed amateur radio station, existing as a lawful residential use, was pre-empted by the United States Constitution. The municipal court refused to entertain the question.

In the appeal to the County Court, *de novo* on the record (two-tier system) the contention was expressed in pre-trial memoranda and again in a post-trial motion. The contention was again advanced on direct appeal to the Superior Court, Appellate Division which specifically rejected the claim. The question again was advanced to the New Jersey Supreme Court, the highest appellate court, in a combined direct appeal and petition for a review by way of Certification. The court dismissed the appeal and denied Certification.

The remaining Federal questions ripened in the Appellate Division opinion. The appellant demanded a jury trial in the County Court and alleged in the Appellate Division that the County Court's denial of the demand, entered after judgment, was error that could void the municipal appeal framework. The Appellate Division refused to qualify the procedure, so a direct appeal was lodged in the Supreme Court of New Jersey alleging invalidity of its municipal appeal rule.

Similarly, the original jurisdiction of the Appellate Division was used to decide jury trial issues for the first time in its judgment. The decision was appealed to the

New Jersey Supreme Court alleging unconstitutionality of the State Constitutional and Rule provisions under U.S. Const. Amendments VI and XIV. The appeal was dismissed.

The abbreviated technique Rule for disposition of appellate issues was first applicable after use in the Appellate Division opinion. A direct appeal to the New Jersey Supreme Court alleged invalidity under U.S. Const. Amendments V, VI and XIV and was dismissed.

STATEMENT OF THE CASE

The appellant Alfred A. Greenberg first was licensed as an amateur radio operator by the Federal Communications Commission in 1938 when he lived in Elizabeth, the County Seat of Union County. Except for military service in World War II, he resided in Elizabeth and was an active radio amateur until 1954 when he moved to his present home in Cranford Township, a short distance away where he continued to operate his amateur radio station.

In 1959, Cranford Township enacted the Zoning Ordinance under which appellant was convicted pursuant to the Zoning Article of the New Jersey Constitution and the enabling general legislation enacted by the Legislature.

After his retirement as a Union County deputy sheriff the appellant began to operate his amateur radio station a great deal; he realized that even though he used nearly the maximum legal power to transmit, his transmission, particularly of long distances interstate and internationally, and his reception, would be more reliable and less transmission power would be required if his antenna system was improved. Also, he intended to operate on additional frequencies that his existing antennas would not accommodate. At this time, in or about the Summer of 1975, his existing antennas were mounted on a mast that emerged from the center of his roof.

Appellant decided to put up two towers; one in the rear yard and one in the side yard which would support his antennas at a height of between 55 and 70 feet. Before starting the project, he called the Police Chief to inquire whether local regulation was involved. The chief also was an active amateur; the appellant knew him more than 30 years. The chief advised that there were no municipal prohibitions and told appellant to "go ahead." Appellant

knew that there were many amateur and commercial towers in the municipality.

Appellant ordered his poles. When they arrived the Police Department notified appellant of the large load and escorted the truck to appellant's property which is at the extreme edge of the municipality; the side yard is in the adjoining municipality.

The poles lay on the ground for a short period; then appellant had them emplaced in the side and rear yards.

Shortly thereafter the Building Inspector received a telephone complaint from a resident who was afraid the towers would interfere with television reception.

The Inspector visited appellant and told him that the towers were too high; a permit was needed to put them up, but first a variance had to be obtained.

Inconclusive negotiations were started with Township officials, and appellant began to complain over the air about his situation. Appellant tried to file a permit application; the Building Inspector refused to receive it, and, following an immediate last on-the-air blast by the appellant about Township officials, quasi-criminal complaints were filed on August 27, 1975 by the Building Inspector under Zoning Ordinance provisions charging excessive tower height, building without a permit (Building Code) and side yard dimension violation. The last charge was dropped at trial.

Following a year of unsuccessful negotiation, the case first was tried in December, 1976 in Municipal Court. That court refused to entertain the federal pre-emption question or an equal protection argument that prosecution was selectively employed as a method of regulating a pre-empted area—television interference, and in the alternative to punish the defendant for his on-the-air criticism of the munic-

ipality. Over objection the court allowed the State to amend the complaint changing the charge of building without a permit from the Building Code to the Zoning Code.

After a one-day trial without jury the defendant was convicted of both counts. Subsequently the court imposed sentences of $1,000 on each count. This was the first interpretation of the ordinance that appellant's exposure on each count had been more than a $200 fine and/or 90 days imprisonment.

Appellant appealed to the County Court, *de novo*, which re-opened the record on discrimination prosecution, and he requested a trial by jury. The court never ruled on the jury trial issue until after judgment of conviction was entered. Then a jury trial was denied. The County Court found that construction without a permit only occurred once and reduced the fine on that count to $200. However, the Court retained the $1,000 fine on the excessive height charge.

On appeal to the Superior Court, Appellate Division, the appellant again argued pre-emption and the jury trial issue as well as non-statutory constitutional issues of state use of perjured evidence and failure to disclose exculpatory evidence on demand and when subject to subpoena, matters that had twice been raised in the County Court on motions but had been denied without findings.

The Appellate Division squarely denied the pre-emption claim; held that the ordinance penal provisions were lawful under State law, and found that the excessive height offense only occurred once. The court reduced the fine for that count to $200.

Of ten legal arguments advanced, the court specifically ruled on points 4(B) and 5(A). The rest, including the

jury trial issue and the obstruction of justice claim simply were denied as without merit and without any findings relying on New Jersey Court *Rule* 2:11-3(e)(2).

Appellant immediately appealed to the New Jersey Supreme Court and also sought Certification raising once more the pre-emption issue and its impact on State organic law, the jury trial issue and raised the due process and equal protection adequacy of the court rule authorizing abbreviated disposition of appellant's claims.

The Supreme Court dismissed the appeal and denied Certification on May 15, 1979. A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on August 7, 1979 and this Jurisdictional Statement followed.

THE QUESTIONS ARE SUBSTANTIAL

A. *The Federal Pre-emption Question*

1. *Regulation of Equipment*

Amateur radio is an important and substantial segment of America's technological resource and a significant element of its foreign policy. There are about 350,000 licensed amateurs in the United States, the largest amateur population in the world. At this writing, the United States is preparing to participate in the 1979 World Administrative Radio Conference and as a matter of foreign policy will support the use of the international radio spectrum by radio amateurs and their international ability to communicate effectively in the high frequency bands. This activity is related to the construction for which appellant stands convicted.

Unlike commercial users of radio, amateur radio is completely non-commercial.[1] Amateurs come from all social, political and financial groups. Some have physical handicaps and amateur radio both is a principal link with society and a source of invention of devices to aid the handicapped. The impact of regulation and the threat of litigation has the potential to completely paralyze amateur radio. Unlike the commercial radio services such as television broadcasting and common carriers, there is no rev-

1. Tit. 47 U.S.C. 153(q).

Tit. 47 C.F.R. §97.112 provided in pertinent part:

"§97.112 No remuneration for use of station

(a) An amateur station shall not be used to transmit or receive messages for hire, nor for communication for material compensation direct or indirect, paid or promised.

The Radio Regulations annexed to the International Telecommunications Convention (1961) enacted at Geneva on 21 December, 1959 provide in Chapter 1, Art. 1, Sec. 2:

"*Amateur Service:* A service of self-training intercommunication and technical investigations carried on by amateurs, that is, by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest."

enue to invest in a return upon litigation; no litigation or regulatory expenses built into the utility rate base, nor even an income tax deduction. The first decision this Court must make on substantiality is the general policy to be followed in burdening a service of this nature. Should primary regulation repose in the F.C.C. with its statutory and Constitutional mandate, uniformity of regulation, enforcement capability and administrative expertise, and with local regulation confined to non-competing, specific compelling local interests, such as safety? Or should the service be forced to bear the chilling effect of omnipresent local enforcement of general state interests [2] which the expert testimony in this case clearly indicates has no rational relationship to the service itself?

Because of the nature of the service there is a locus of risk to chilling by local regulation. The distance that the locus is to be kept from the amateur service is a substantial question of federal policy to be decided on Constitutional principles.

This case presents two distinct pre-emption problems.

The first is the direct conflict with federal policies by a particular state statutory application to be decided under the principles of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). There is undisputed testimony by Dr. Jerry Sevick of Bell Labs for the appellant leading to a legal conclusion that "compliance with both federal and state regulations is a physical impossibility." *Id.* at 158. No

2. The amateur radio service and its towers are nowhere mentioned in the Zoning Ordinance, the New Jersey Constitution nor the enabling legislation. The height prohibition and prior restraint permit apply to "accessory structures." At the municipal court trial, the State amended the charges away from the Building Code where structural adequacy and safety are treated. Prior to adoption of the Zoning Ordinance the New Jersey Supreme Court declared amateur radio to be a legitimate residential accessory use, a policy which the State adopted at trial with relation to the Zoning Ordinance. See, *Wright v. Vogt*, 7 N.J. 1, 80 A.2d 108 (Sup. Ct. 1950), one of the leading cases of this type, nationwide.

court has ruled on this argument although testimony was in early. The municipal court allowed a record to be made but refused to consider the testimony.

The second argument is made that the 16 foot policy of the general subject-matter ordinance authorized by a general subject-matter statute and Constitutional provision [3] is a dimensional requirement directly conflicting with the Federal policy of Tit. 42 U.S.C. §303(e), (f), (r). These statutes, enacted pursuant to the Commerce Clause, are implemented by the F.C.C. regulation then in force, Tit. 47 C.F.R. §97.77.

The ultimate pre-emption argument based on this regulatory provision is that the F.C.C. intended to occupy 100% of the apparatus and operating regulatory field by referring to an ascertainable standard that may be enforced among the licensed amateurs who are qualified technically by examination.[4]

The last New Jersey court to pass on this question below, the Appellate Division, did so generally, expressly rejecting the dimensional pre-emption argument relying on dictum in an earlier case.[5] An examination of the New York and New Jersey cases rejecting dimensional pre-emption discloses that both courts rely for their conclusions on a purported F.C.C. failure to affirmatively prescribe specific antenna dimensions by regulation except in certain instances. Neither court noted that the dimensional limits that they rely upon are not so much dimensional limits as a trigger mechanism requiring coordination and prior approval of the F.C.C. and air navigation authorities in the vicinity of airports.[6]

3. The delegated use of State power is settled in New Jersey. *Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp.*, 71 N.J. 249, 263, 364 A.2d 1016 (Sup. Ct. 1976).

4. Eg.: Tit. 47 C.F.R. §97.21
"(e) Element 3: General amateur practice and regulations involving radio operation and apparatus and provisions of treaties, statutes, and rules affecting amateur stations and operators."
Dr. Terry Sevick testified to these standards in the initial hearings.

5. *Skinner v. Zoning Bd. of Adjust.*, Cherry Hill Tp., 80 N.J. Super. 380, 391, 193 A.2d 861 (1963). The dictum was adapted from the holding in *Presnell v. Leslie*, 3 N.Y.2d 384, 165 N.Y.S.2d 488, 114 N.E.2d 381, 384-385 (Ct. App. 1957).

It is submitted that the New York and New Jersey courts erred in interpreting supposed Federal silence in all other dimensional instances as authority to regulate.[7] In fact, the purported silence on general antenna dimensions in the section relied on by the state courts is expressly accounted for in Tit. 47 C.F.R. §97.77.[8]

What has happened in legal contemplation is that according to the effect of Dr. Sevick's testimony, the State through its municipality, has acted affirmatively to impose a design requirement upon the active apparatus of a federally-licensed radio station, the substantial federal question reserved in *Ray v. Atlantic Richfield Co., supra*, 435 U.S.

6. Tit. 47 C.F.R. §97.45.

7. " 'Where the failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Bethlehem Steel Corp. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).

8. The international policy is very specific. Ch. IV, Art. 14, Sec. 1. §3 of the International Radio Regulations requires the use of directional antennas to minimize interference. The appellant was engaged in erecting support towers for such antennas when he was prosecuted.

Ch. IV, Art. 12 §1(2) requires state of the art technical compliance, on an international basis using recommendation of the International Telephone and Telegraph Consultative Committee as technical standards where applicable.

Ch. IV, Art. 12 §2 requires internationally, that comparable transmitting and receiving systems be used and take into account equipment used in the neighboring spectrum. Dr. Sevick's testimony indicates that the higher antenna heights would be consonant with internationally acceptable systems and would reduce proximity interference to domestic television and telephone services.

at 179 n.29. One result is that the federal policy requiring use of minimum power has been impeded.[9]

2. *Foreign Relations*

The Federal Communications Act establishing the Federal Communications Commission has as one purpose to make available "a rapid and efficient nationwide, and world-wide wire and radio communication service . . ." Tit. 47 U.S.C. §151. Preceding the first governmental acts, amateur radio historically has been one of the most active media of foreign intercourse. Administratively recognizing its historic and contemporary importance, including the history of United States recognition of the amateur service in international regulatory affairs, the F.C.C. concluded that one basis and purpose of its Regulations was

> "(e) Continuation and extension of the amateur's unique ability to enhance international good will." Tit. 47 C.F.R. §97.1.

Here the United States has expressed an opinion that the role of amateur radio regulation "is inextricably enmeshed in international affairs and foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 434 (1968). At this particular time, in addition to the international character of amateur radio, discrimination against it on the basis of ill-defined, pluralistic, local considerations accompanied by any failure of this Court to act decisively to preserve the international character of the service can only be seen internationally as a sign of increasing insularity and isolationism directly in conflict with the initiatives about to be taken by the United States in the World Administrative Radio Conference of 1979.

9. Tit. 47 U.S.C. §324. Tit. 47 C.F.R. §97.67(b) Ch. IV, Art. 14 Section I of the International Radio Regulations provides:

"§2. All stations shall radiate only as much power as is necessary to ensure a satisfactory service."

> "Where international relations power is involved, any concurrent state authority is restricted to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

State regulation of the type involved in this appeal "affects international relations in a persistent and subtle way." *Zschernig v. Miller, supra*, 389 U.S. at 490. The fragile character of this privately-operated medium cannot stand increasing encroachment of state action.

At the present time validity of local regulation involving amateur radio antennas has turned on the local issue whether amateur radio is an accepted residential use.

It is surprising, in view of the pre-eminence of the American amateur body and the political character of international relations, that the United States has tolerated the prevailing practice allowing doctrines governing important parameters of an interstate and international communication service to be set according to local policies with no thought of their international implications. The issue of Federal pre-emption, adequately raised below, is both ripe and timely, and it is fully substantial for a decision by the Court.

B. *The Jury Trial Issue*

Upon conviction in the Municipal Court, the appellant was aware for the first time that Cranford Zoning Ordinance Art. 22 had exposed him to jail for more than a petty offense.[10] The municipal court made no specific

10. Cranford Zoning Ordinance, Art. 22.
"24-96 Penalty
(a) Any . . . person who shall violate any of the provisions of this chapter . . . shall be liable to a fine for not more than $200 or imprisonment for not more than 90 days or both such fine and imprisonment. A separate offense shall be deemed committed on each during or on which a violation occurs or continues."

findings on the quantum of guilt. However, in the eighteen months to trial, exposure could have been $109,500 and imprisonment for 98,500 days (270 years). The issue of duration of the offense, a fact question, had enormous significance.

The appellant appealed to the County Court, asking for a jury trial. New Jersey does not use a full *de-novo* second tier. The trial is "de-novo on the record." The reviewing court has authority to re-open the record for limited purposes, but jury trials are prohibited by the challenged court rule, *R.* 3:23-8(a). In addition to the duration of offense, the appellant was extremely anxious for a jury to hear Dr. James O'Kane, a sociologist, who testified in Municipal Court that the appellant's use qualified as an institutional and public use.[11] The jury trial was denied after a judgment of conviction had been entered.

The appellant alleged error to the Appellate Division, arguing right to a jury trial or invalidity of the Rule. He raised the same issue in both courts specifically citing *Ludwig v. Massachusetts*, 427 U.S. 618, 624 (1976). The Appellate Division held the appellant's argument "without merit." The appellant then raised the constitutional question of invalidity in the New Jersey Supreme Court which refused to decide the question.

One other constitutional issue arose from a specific holding of the Appellate Division. That court held that the excess height violation only was committed once. Appellant immediately appealed to the New Jersey Supreme Court alleging that the limited original jurisdiction of the Appellate Division contained in the New Jersey Constitution and Court Rule was unconstitutional because it was an extension of the jury trial issue already in the case: those appellate findings should be made by a jury. The Supreme Court dismissed the appeal and denied Certification.

11. Cranford Zoning Ordinance Art. 8, §24-39(b)(1) and Art. 1, §24-2 exempted some accessory structures from the height limit provided the use was instructional or public. Dr. O'Kane's opinion was that appellant's use qualified. No court has made findings despite repeated requests.

C. *N.J. Court Rule 2:11-3(e)(2)*

The cited Rule is contained in that portion of the Rules governing appellate practice.[12] It appeared for the first time in these proceedings in the judgment of the Appellate Division. Consequently, the first opportunity to challenge it came in the Certification and direct appeal proceeding to the New Jersey Supreme Court, and this was done alleging invalidity under U.S. Const. Amends. V, VI and XIV, Due Process and Equal Protection Clauses. Review was denied.

There are three extremely substantial and important Federal questions arising from the Appellate Division's use of the challenged rule to dispose of most of the appeal. The first arises in connection with the holding on "paragraph 3" of the Appellate Division opinion:

> "3. Obstruction of justice by the State requires dismissal of the complaint."

Examination of the record will reveal unrebutted evidence of perjury by the Building Inspector, intimidation of witnesses by the State and failure to disclose exculpatory evidence on demand and in response to subpoena. Some of the evidence was uncovered by the appellant and is in the record. Conduct of this type is covered by *Brady v. Maryland*, 373 U.S. 83 (1963) and by the line of cases culminating in rather explicit rules of application set forth in *United States v. Agurs*, 427 U.S. 97, 103-104, 104-106,

12. N.J. Court Rule 2:1 Scope.
"Unless otherwise stated, the rules in Part II govern the practice and procedure in the Supreme Court and the Appellate Division of the Superior Court."

110-111 (1976). As a matter of constitutional compulsion, allegations and evidence of this type require judicial findings and conclusions. *Id.* at 108. None were made in the County Court and Appellate Division construction of the challenged rule thus holds that they are unnecessary below or even at the Appellate level.

Findings by the court are indispensable to orderly judicial review of constitutional questions arising in search and seizure, identification procedures, confessions and any other constitutional matters that must meet threshhold criteria and where a record must be made.

Not only does the Rule fail for want of elementary Due Process requirements; it could not be better calculated to impede the construction of a complete record necessary for the effective assistance of counsel on appeal; of preserving a record of error on appeal and to discriminate against adequate proof of Federal questions necessary to establish jurisdictional grounds for Federal review. See, 28 U.S.C. §1257(2).

A state rule which directly impedes access to this Court at the outcome of a single criminal prosecution should raise the most substantial questions of due process and effectiveness of counsel quite apart from this Court's general, historic interest in adequacy of the record as a due process matter.[13]

As applied in this case, the Rule serves to mask the failure of the trial court to fulfill its constitutional responsibility to make findings and its obstruction of attempts by appellant to make a Federal record. A mask, or whitewash, of this type is not the allowable due process correction

13. See, *e.g.*, *Norvell v. Illinois*, 373 U.S. 420 (1963), *Draper v. Washington*, 372 U.S. 487 (1963), *Hardy v. United States*, 375 U.S. 277 (1964) and the excellent discussion in *Commonwealth v. Anderson*, 441 Pa. 483, 272 A.2d 877, 882 (Pa. Sup. Ct. 1971).

constitutionally contemplated by judicial review. *Frank v. Mangum*, 237 U.S. 309, 335, 336-337 (1915), *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

The second infirmity of the Rule is undoubtedly the worst. Applying the Rule, the Appellate Division used the language:

> "All but two of the issues now raised are so clearly devoid of merit as to require no discussion."

Counsel on the appeal was and is a member of the New Jersey Bar. The quoted paragraph constitutes an accusation of unprofessional conduct amounting to malpractice of disciplinary magnitude.[14] The Rule only involves criminal appeals, and lawyers handling criminal appeals, including Public Defenders, receive these "one-liners" with great regularity. A pattern of these opinions is evidence of professional neglect.[15] An in-depth analysis of this Rule as it is used in reported cases would disclose widely varied and contradictory application.[16]

The minimum that can be said is that systematic use of this rule to expedite court business by scapegoating lawyers handling criminal appeals is a direct attack upon the effective assistance to clients by those lawyers in viola-

14. "DR 7-102 Representing a Client within the Bounds of the Law.
(A) In his representation of a client, a lawyer shall not:
• • •
(2) Knowingly advance a claim or defense that is unwarranted, under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law."

15. "DR 6-101. Failing to Act Competently.
(A) A lawyer shall not
• • •
(2) Exhibit a pattern of negligence or neglect in his handling of legal matters generally."

16. The annotated rule book (Gann ed.) published by authority of the Administrative Office of the Courts, notes that the Rule was enacted effective May 19, 1975 "with the intention of facilitating the Appellate Division's handling of its ever-increasing work load. . . ."

tion of the Fifth, Sixth, Fourteenth Amendment, Due Process and Equal Protection Clauses, the argument made to the New Jersey Supreme Court.

This Court cannot expect the spirit of effective advocacy to continue indefinitely in the face of such an intimidating barrage. This question is not only substantial but imperative.

The final substantial constitutional infirmity of the Rule is that it serves as the key provision of a dual system of justice, separate, unequal, and clandestine, that functions parallel to a public system and systematically denies to a litigant both a due process system of justice and the laws and procedure existing in the "public" system. Here is how the system works:

Appellant alleged on the opening day of trial in the Municipal Court that he was being prosecuted discriminatorily on the basis of invidious criteria. *Oyler v. Boles*, 368 U.S. 448 (1962). The court promptly declared it would not permit proof, quashed the defense subpoenas, restricted cross-examination of the Building Inspector and issued an oral opinion which did not mention the equal protection claim.

At the point in the expanded County Court hearing that expanded evidence of invidious discrimination and obstruction of justice by the State was offered, the Court terminated the hearing and called for the case to be presented in writing.[17] The County Court confined all further proceedings, including two motions, to writing only.

Then the County Court issued letter opinions. To be published opinions must be approved by a Committee

17. N.J. Court *Rule* 1:2-1 provides in pertinent part:
"All trials, hearings of motions and other applications . . . and appeals shall be conducted in open court unless otherwise provided by rule or statute. . . ."

on Opinions.[18] The Supreme Court of New Jersey has fixed standards for publishable opinions (regardless of whether they are in fact published or selected for publication).[19]

> "The Committee on Opinions shall consider for publication only those opinions submitted in regular opinion form. Letter opinions and transcripts of oral opinions shall not be considered for publication. *Opinions approved for publication shall not cite unpublished opinions* (Emphasis added).

By selecting the oral and letter opinions, both trial courts were permitted by affirmative authority to determine that the content of their decisions never would see the light of day as part of the jurisprudence of the State or even be cited in a published opinion. Thus their complete failure to apply settled State and Federal law to such essentially unrebutted evidence areas as pre-emption, obstruction of justice and jury trial rights carefully was isolated from disclosure and, in turn, is prevented from exerting any impact on the formal jurisprudence of the State.[20] The decisions below seriously "changed or reversed" established principles of State and Federal law.

On the other hand, Appellate Division opinions are in publishable format.

The *Standards* provide that:

18. N.J. Court *Rule* 1:36-2.

19. Standards for Publication — Judicial Opinions (May 2, 1974). Manual of Style — Judicial Opinions (May 2, 1974).

20. The *Standards* indicate that decisions *shall* be published where, among other things:

1. Substantial Federal or State Constitutional questions are decided.
2. New and important law questions are determined.
3. "The decision changes, reverses, seriously questions or criticizes the soundness of an established principle of law."

> "2. The fact that an opinion is by the Appellate Division of the Superior Court rather than a trial court shall weigh in favor of its publication."

Thus, only by using the challenged rule surgically, as was done in this case, can the judicial system convey to the municipality that its zoning system is intact while absolutely insuring that the reasons therefor, resting on radical departures from decisional law, State and Federal, will not impact on or be impacted by the formal system after the case was selected into the underground system protection violations and a separate system of law in the lower courts.

Judicial abuses in history repeat themselves because a mechanism is useful regardless of the reason for its use and they must be periodically excised through eternal vigilance. The judicial mask of *Frank v. Mangum, supra,* was used to enforce racial policies. The same mask, the same mechanism, used in New Jersey, is advertised as an economy measure but is applied systematically to cover up egregious official misconduct and due process and equal protection violations in the lower courts.

While case loads are shibboleths that this Court must consider, maintenance of basic constitutional standards must have priority over arguments of essentially political expediency.

There is no more fundamental nor substantial a Federal question than a demonstration that a State judicial system makes a dual system of justice effective through the use of a linchpin rule in the last public judicial proceeding available of right to all litigants.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

KENDALL and KESSLER,
Attorneys for Appellant

By: /s/ Elson P. Kendall
ELSON P. KENDALL
2815 Carol Road,
Union, New Jersey 07083
(201) 687-7310

August 13, 1979

OPINION OF THE SUPERIOR COURT OF NEW JERSEY

Argued March 6, 1979—Decided March 16, 1979

Before Judges Halpern, Ard and Antell.

On appeal from Superior Court of New Jersey, Law Division, Union County.

Elson P. Kendall argued the cause for appellant.

Ralph P. Taylor argued the cause for respondent.

PER CURIAM.

Defendant is an amateur radio operator who erected four 55′ high poles next to his home located in a residential zone. He intended to install several antennas on the poles which, when attached, would make the entire structure about 80′ high. The Cranford Municipal Court, and the Union County Court on a *de novo* appeal, found that he had violated two provisions of the Cranford zoning ordinance in erecting the poles without obtaining a building permit and erecting them in excess of the 16′ height limitation for accessory structures. The County Court Judge fined defendant $200 for failing to obtain a permit; and fined him $1,000 for erecting the poles in violation of the 16′ height limitation. Defendant appeals.

A summary of the issues projected in defendant's brief follows:

1. A remand is necessary to allow consideration of the issue of selective enforcement;
2. If a remand is not necessary, this court should decide that he was selectively prosecuted;

3. Obstruction of justice by the State requires dismissal of the complaint;
4. The judge should have declared a Cranford zoning ordinance void;
5. The judge should have found that defendant was exempt from the 16′ height limitation because he was a quasi-public institution;
6. Defendant was denied "a trial on the merits" when the judge failed to permit post-trial argument after counsel had sent certain documentation to him;
7. The judge erroneously ruled that defendant was not entitled to a jury trial;
8. It was error to amend the complaint to charge violation of the Cranford zoning ordinance rather than of the state building code;
9. It was error to deny judgment notwithstanding the verdict or a new trial, and
10. The penalty was excessive.

We are in essential accord with the findings and conclusions reached by Judge Callahan as set forth in his letter opinions of April 26, 1977 and May 18, 1977, except as hereinafter noted. All but two of the issues now raised are so clearly devoid of merit as to require no discussion. *R.* 2:11-3(e)(2). We comment briefly only on points four(B) and five(A) in defendant's brief.

The thrust of defendant's point five, as expanded at oral argument, is that his status as an amateur radio operator makes his radio station a "quasi-public-institutional use" exempting him from complying with Cranford's ordinance because the federal government has preempted the field.

He cites no authority for this proposition and we know of none. While federal regulations include standards for amateur radio operators, local authorities are not barred from regulating the height of antennas used by such operators since such matters do not impinge on the national interest. *Skinner v. Zoning Bd. of Adjust., Cherry Hill Tp.*, 80 N.J. Super. 380, 392 (App. Div. 1963).

The thrust of point four(B) is that the Cranford Zoning Ordinance permits only a maximum fine of $200 for any violation. *N.J.S.A.* 40:49-5 authorizes a municipality to prescribe penalties not in excess of $500 for the violation of ordinances. Contrary to defendant's contention, the ordinance here clearly does not violate the statute so that the penalty clause need not be declared void. See *Verona v. Shalit*, 96 N.J. Super. 20, 24 (App. Div. 1967).

However, the judge erred when he held that defendant violated the height provision of the ordinance every day the poles remained on his property. The complaint charged defendant with erecting poles which violated the height limitation. That occurred on one occasion and it was error to hold that defendant could be fined for each day the poles remained in place. The judge imposed a $1,000 fine for violation of that count in the complaint. We direct that that fine be reduced to $200.

Except as modified, the judgments are affirmed.

ORDER DISMISSING APPEAL

(Filed May 15, 1979)

This matter having been duly presented to the Court, it is ORDERED that the appeal is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of May, 1979.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

ON PETITION FOR CERTIFICATION
(Filed May 15, 1979)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of May 1979.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

In The

Supreme Court of the United States

October Term, 1979

No. 79-237

ALFRED A. GREENBERG,

Appellant,

vs.

STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OR AFFIRM

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ALFRED A. GREENBERG,

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Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Jersey on the grounds that the appeal presents no substantial federal question and that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of whether New Jersey Statute 40:55-30 and Cranford Township Zoning Ordinance (1959) Article 4, Section 24-17(b) and Article 20, Section 24-81(a) violate the provisions of Article I Section 8 and Article VI cl. 2 of the United States Constitution when applied to regulate the permissible antenna height of a federally licensed amateur radio station.

New Jersey Statute N.J.S.A. 40:55-30 provides that any municipality may by ordinance limit and restrict to certain districts and regulate therein buildings and structures according to their construction, and the nature and extent of their use, and the uses of land, all within the power of the State (JS5-6).

The statute further provides that the authority conferred shall include the right to regulate the height, number of stories, size of buildings and other structures, and the location and uses and extent of use of buildings (JS6).

In accordance with the provisions of this statute, the Township of Cranford, a municipal corporation of the State of New Jersey, enacted as part of its Zoning Ordinance Article 4, Section 24-17, which limits the height of accessory buildings or structures in a residential zone to 16 feet, and Article 20 Section 24-81 which provides that no building or structure or part thereof shall be erected until a permit shall be granted by the Building Inspector (JS6).

B. The Proceedings Below

On or about June 23, 1975, appellant erected four telephone type poles on his property in the Township of Cranford for use in the construction of two 75 foot radio antenna towers to be

utilized in conjunction with the operation of appellant's amateur radio station.

On December 4, 1976 appellant was found guilty in the Cranford Township Municipal Court and fined $1,000 on each of two counts contained in a complaint filed by the Cranford Township Building Inspector charging excessive tower height and building without a permit.

Appellant appealed to the Union County Court, Law Division, which affirmed the conviction in the quasi-criminal action below but reduced the fine for construction without a permit to $200.

Appellant appealed to the Superior Court, Appellate Division, which affirmed the decision of the Law Division but reduced the fine on the excessive height offense to $200 (JS28-30).

On May 15, 1979 the Supreme Court of New Jersey dismissed appellant's appeal and denied certification (JS31-32).

The state courts below denied appellant's claim that regulation of the apparatus of a federally licensed amateur radio station was preempted under the United States Constitution and by federal law.

ARGUMENT

I.

The appeal presents no substantial federal question.

In *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) the Supreme Court upheld the constitutionality of a municipal comprehensive zoning law which regulated among other things the size and height of buildings or structures within the municipality.

A zoning ordinance will not be upheld if it is clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals or general welfare. *Gorieb v. Fox*, 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675 (1927).

While not contending that the zoning regulations are unreasonable and arbitrary per se, appellant argues that the municipal regulations are inapplicable because the Federal Communications Commission intended to and has fully preempted the field of regulating federally licensed amateur radio stations (JS14-18).

In New Jersey, as in other jurisdictions, the preemption argument has met with rejection by the state courts.

In *Wright v. Vogt*, 7 N.J. 1, 80 A.2d 108 (1951) the New Jersey Supreme Court held that a radio antenna tower was a permissible accessory use in a residential district provided that the construction complied with the height limitation of the local zoning ordinance.

In *Skinner v. Zoning Board of Adjustment of Cherry Hill Township*, 80 N.J. Super. 380, 193 A.2d 861 (A.D. 1963) the New Jersey Superior Court, Appellate Division, squarely held that the denial of a permit would not constitute an unlawful invasion by a municipality into a federally preempted field of regulation citing the decision of the highest New York Appellate Court in *Presnell v. Leslie*, 3 N.Y. 2d 384, 165 N.Y.S. 2d 488, 114 N.E. 2d 381 (Ct. App. 1957).

In *Kroeger v. Stahl*, 148 F. Supp. 403 (D.C. 1957), *aff'd*, 248 F.2d 121 (3rd Cir. U.S.C.A. 1957) the U.S. District Court for the District of New Jersey held that the mere fact that a radio station was engaged in interstate commerce and the property in question was used for that purpose did not affect the validity of the zoning ordinance. The court's decision was affirmed by the U.S. Court of Appeals for the Third Circuit.

Thus it appears that both New Jersey and the federal courts have determined that there exists no federal preemption in this field and that the municipality may enact and enforce reasonable regulations relating to the height of radio antenna towers.

Nevertheless, appellant argues that all of the aforementioned courts were in error in their respective determinations and that preemption has occurred.

However, appellant cites in the Jurisdictional Statement no specific federal statute or regulation which would tend to indicate that the regulation of the antenna height of amateur radio stations has been federally preempted.

Rather, appellant has merely demonstrated that Congress has delegated general regulatory powers to the Federal Communications Commission under 47 U.S.C. Section 303.

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L. Ed. 2d 852, 80 S. Ct. 813 (1960), this Court stated that in determining whether state regulation has been preempted by federal action, the intent to supersede is not to be inferred by the mere fact that Congress has seen fit to circumscribe its regulation and occupy a limited field. Such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963) the Supreme Court held that the jurisdiction of the Federal Communications Commission to regulate radio advertising did not preclude the State of New Mexico from proscribing price advertising of eyeglasses by radio.

The Court concluded that it would be inappropriate to give the federal statute preemptive effect in view of the absence of a clear congressional mandate. *Head v. Board of Examiners*, *supra*, 374 U.S. 443-445.

Appellee respectfully asserts that the Cranford Township Zoning Ordinance is a regulation of general application designed to promote the health and welfare of the community similar to the New Mexico regulation upheld by the Supreme Court in *Head v. Board of Examiners.*

There appears to be no conflict between the act of Congress and the local regulation, and under the principles of preemption discussed previously the Court should dismiss appellant's appeal, or, in the alternative, affirm the judgment below.

II.

The New Jersey Court Rule precluding jury trials in cases of this type is not invalid.

New Jersey Court Rule 3:23-8(a) provides that an appeal from a judgment of a municipal court shall be heard *de novo* on the record unless it shall appear that the rights of a defendant were prejudiced below in which event a plenary trial *de novo* without a jury shall be conducted.

Appellant in this cause appealed from such a judgment and demanded a jury trial which was denied by the Union County Court, Law Division. The denial of a jury trial was upheld by the Superior Court, Appellate Division, and the New Jersey Supreme Court denied certification and dismissed appellant's appeal (JS28-32).

Appellant stands convicted of failing to obtain a building permit to erect his radio antenna tower and of constructing the tower in excess of the height limitation established in the Cranford Township Zoning Ordinance.

Section 24-96(a) of the ordinance establishes the penalty for violation of the ordinance to be a fine of not more than $200 or imprisonment for not more than 90 days or both.

The statutory limit on penalties for violation of local ordinances is established in New Jersey by N.J.S.A. 40:49-5 to be a $500 fine or 90 days imprisonment or both.

In support of his argument on the jury trial issue, appellant cites the case of *Ludwig v. Massachusetts,* 427 U.S. 618, 49 L. Ed. 2d 732, 96 S. Ct. 2781 (1976). However, in that decision the Supreme Court held that the Massachusetts "two-tier" system did not violate a defendant's right to trial by jury.

In *Ludwig v. Massachusetts* this Court referred to its decision in *Duncan v. Louisiana,* 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) which held that the right to a jury trial exists in a "serious" criminal case rather than in a case involving a "petty offense".

The Court held in *Duncan v. Louisiana* at 391 U.S. 160 that crimes carrying penalties up to 6 months do not require a jury trial if they otherwise qualify as petty offenses.

The Supreme Court stated that in the federal system petty offenses are defined as those punishable by no more than 6 months in prison and a $500 fine. In addition, in 49 of the 50 states, crimes subject to trial without a jury are punishable by no more than one year in jail. *Duncan v. Louisiana, supra,* 391 U.S. 161.

Under these guidelines, it would appear that no right to a jury trial existed in the case at bar so that the result below need not be disturbed on this ground.

III.

Affirmance without opinion under New Jersey Court Rule 2:11-3(e)(2) does not violate appellant's right to due process.

In the Jurisdictional Statement appellant argues that the New Jersey Court Rule 2:11-3(e)(2), permitting affirmance without opinion where some or all of the issues raised on appeal are clearly without merit, deprives appellant of his due process rights since it does not provide for the orderly judicial review of constitutional questions arising in criminal proceedings (JS21-26).

It must be noted that Judge Callahan, sitting in the Union County Court, Law Division, wrote a 9 page opinion letter in which he made specific findings on the issues raised by appellant.

This opinion letter, together with the transcript of the proceedings below and the briefs of counsel were all considered by the Superior Court, Appellate Division, in accordance with New Jersey Court Rule 2:5-4(a).

Oral argument was heard by the Appellate Division on March 6, 1979 and the opinion contained at pages 28-30 of the Jurisdictional Statement was rendered on March 16, 1979.

The Superior Court, Appellate Division, gave full consideration to the appeal but found it without merit save for the two areas discussed in the opinion.

In no way can this appellate procedure be characterized as depriving appellant of his right to due process.

Similarly, the New Jersey Supreme Court dismissed the appeal taken by appellant and the petition for certification filed after its review of these applications (JS31-32).

There is no compulsion on the part of the New Jersey Supreme Court to express in detail its reasons for denying certification or dismissing an appeal it considers to be without merit.

The United States Supreme Court itself has adopted such procedures as reflected in Supreme Court Rule 16 and Rule 25. There appears to be no reason to disturb the result below based upon the reasons appellant alleges in Point C of the Jurisdictional Statement.

CONCLUSION

WHEREFORE, appellee respectfully submits that the appeal at bar presents no substantial federal question and that the questions on which the decision of the cause depends are so insubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

s/ Donald R. Creighton
Attorney for Appellee

APPENDIX

OPINION LETTER DATED APRIL 26, 1977

UNION COUNTY DISTRICT COURT

JOHN J. CALLAHAN
Judge

Court House
Elizabeth, N.J. 07207

Elson P. Kendall, Esq.
310 Madison Hill Road
Clark, NJ 07066

Ralph P. Taylor, Esq.
113 Miln Street
P.O. Box 247
Cranford, NJ 07016

Gentlemen:

Re: State v. Alfred A. Greenberg
Municipal Appeal #2400

The facts from the record confirm that defendant, Alfred A. Greenberg, has resided in a one family dwelling known as 313 Bloomingdale Avenue, Cranford, since January 1954. He owns this property which is located partially in Cranford Township and partially in adjacent Kenilworth Borough. The record reflects the Cranford portion is in a residential zone, although there is no evidence as to the zoning of that portion in Kenilworth. All of the physical evidence, however, creates the impression that Kenilworth's portion also is residentially zoned. The gentleman has been active in amateur radio over the entire period of his residency as far back as 1938.

On or about June 23, 1975, the defendant erected on his property four telephone type poles. Two poles were erected in

his side yard and two in his rear yard. Each pole was 65 feet in length, with 10 feet below ground level and 55 feet above ground level. Defendant described his interest to construct two antenna towers on this property. The total height of each completed tower would have been approximately 75 feet. Defendant started to construct the towers, without attempting to file his plans and secure a building permit from the Township of Cranford.

The building inspector shortly thereafter informed the defendant that his towers were in violation of the Township's zoning ordinance and recommended that the defendant apply to its Board of Adjustment for a variance. Greenberg then notified the building inspector that he would neither remove the poles nor apply for a variance. Robert Fuller, Building Inspector of the Township of Cranford, then filed a complaint in the Cranford Municipal Court on August 27, 1975.

On September 24, 1975, a request for an indefinite adjournment was made to the Court. Elson P. Kendall, Esq., defendant's counsel, obtained agreement to have the matter postponed to enable defendant to apply for relief from the Board of Adjustment. The matter was adjourned by the Court, but reactivated and subsequent trial was had on December 4, 1976, in the Cranford Municipal Court when the application to the Zoning Board was never pursued.

During the trial, defendant's own testimony showed that he was an ardent amateur ham radio operator, that this was his hobby; that with his existing antenna he could utilize this total equipment to talk to people all over the world; that the type of antenna defendant desired to construct would be unique and, in defendant's own words, that after he finished "many would follow." Apparently, Greenberg has not been able to complete the projected tower plan to utilize those towers.

The defendant was found guilty of two violations of the Township of Cranford on December 6, 1976. The Court below

found the defendant had installed four poles that were to be used as radio antenna towers without obtaining a building permit contrary to Article 20, Section 24-81(a) of the Cranford Zoning Ordinance; and that defendant had erected an antenna tower over 16 feet in height in violation of Article 3, Section 24-17(b) of the Cranford Zoning Ordinance.

Defendant now appeals from the findings of the Cranford Municipal Court.

Sequentially, the Court heard argument on the appeal on March 9th, determined that the lower Court improperly quashed the service of defense subpoenas and allowed Greenberg to resubpoena those witnesses, and records, who might give evidence on the residential selectivity of enforcement proofs. The right to compulsory process, this court held, should not be denied in view of the technical failure by an agent making service to prepare such process erroneously and fail to tender the proper witness subpoena fee.

The right of a criminal defendant to compulsory process, as guaranteed by N.J.S.A. Const. Art. 1, 10, 15, is "fundamental to our legal system," *People v. Watson,* 221 N.E. 2d 645, 648 (Sup. Ct. of Ill. 1968), and constitutes "a basic constitutional safeguard; consequently, any rule which abridges this right must be examined with scrutiny." *Ezell v. State,* 413 *S.W.*2d 678, 680-681 (Sup. Ct. of Tenn. 1967). *See also, United States v. Nixon,* 418 *U.S.* 683, 711-713 (1974); *State v. Jones,* 57 *N.J. Super.* 260 (App. Div. 1959). Thus, defendant's claim of an abridgement of this right must be carefully scrutinized. Proceedings to enforce zoning ordinances are "at least quasi-criminal in nature," *State v. Seich,* 98 *N.J. Super.* 466, 471 (Cty. Ct. 1967), and should, therefore, be viewed "as criminal in nature . . ." *State v. Loux,* 76 *N.J. Super.* 409, 414 (App. Div. 1962). *See also, Town of Kearny v. Modern Transportation Co.,* 116 *N.J. Super.* 526, 529 (App. Div. 1971).

In view of the reasonableness of the error involved, such a fundamental right should not be voided on such a technical application of the law. Counsel volunteered to comply immediately below in tender of all fees. Whether evidence of such discriminatory enforcement could be spelled out, however, was presented to the Court in an almost full day hearing on March 24th. Mere selectivity not "deliberately based upon an unjustified standard," is an insufficient basis upon which to prove an equal protection violation. *State v. Rowe*, 140 *N.J. Super.* 5, 9 (App. Div. 1976). *See also, State v. Jennings*, 126 *N.J. Super.* 70, 79-80 (App. Div.) *certif. denied*, 60 *N.J.* 512 (1972); *United States v. Steele*, 461 *F*2d 1148 (9th Cir. 1972). This principle which the court understands defendant to bottom his attack of the prosecution upon is more fully set forth in *Oyler v. Boles*, 368 *U.S.* 448 (1962), where the Court at page 453 stated: "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case [a habitual offender prosecution] might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Accord: State v. Boncelet*, 107 *N.J. Super.* 444, 453 (App. Div. 1969); *State v. Savoie*, 128 *N.J. Super.* 329, 337 (App. Div. 1974), *rev'd on other ground*, 67 N.J. 439 (1975); *State v. Saunders*, 130 *N.J. Super.* 234, 241 (Law Div. 1974).

In *Steele, supra*, defendant was charged with refusing to answer census questions, in violation of 13 U.S.C.A. §221(a). Defendant claimed, and his claim was supported by the evidence, that of a large number of violators, he and three others alone were chosen for prosecution because of their active participation in "a census resistance movement . . ." *Id* at 1150. The Court found this evidence sufficient to prove "that the authorities purposefully discriminated against those who chose to exercise their First Amendment rights," and thus "entitled [defendant] to an acquittal." *Id* at 1151. The Court went on to

hold, at page 1152: "The government offered no explanation for its selection of defendants, other than prosecutorial discretion. That answer simply will not suffice in the circumstances of this case. Since *Steel* presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground. Mere random selection would suffice . . . Since no valid basis for the selection of defendants was ever presented, the only plausable explanation on this record is the one urged by [defendant]."

Two utilities, New Jersey Bell Telephone Company and Public Service Electric and Gas Company, were released from the effect of the subpoenas returnable on March 24th, upon filing subsequently of affidavits with the Court. These affidavits confirm the Telephone Company has exclusive control of some one hundred forty-three (143) poles extending twenty-nine feet, six inches (29'6") from ground to pole top and some three thousand poles jointly shared with the electric utility. The latter range up to a height of forty-eight feet (48') (from ground to pole top. This height is reputed to be the exception or "occasional" pole, as opposed to the remaining majority thirty-four foot (34') or thirty-eight foot, six inch (38'6") poles from ground to top of pole. The Electric Company also maintains three (3) electric transmission towers within the township ranging in height to one hundred fifty-eight feet (158'). Although there is currently litigation being carried on in the municipality against this type of power structure, counsel for the municipality validly argues that municipal jurisdiction over these structural items is precluded by the terms of N.J.S. 40:55D-19.

A number of subpoenaed business persons in the community and a representative of a commercial business dealing in the actual erection of such radio structures for business therein also testified. To review their individual testimony would add nothing to this record in spelling out anything unusual, let alone providing any clue to official

complicity to improperly approve such radio tower structures in Cranford. There were two exceptions where towers were apparently erected without official sanction in the case of a Fuel Oil Supply Company and an individual business entrepreneur. No evidence, however, shows the town was aware of such violations.

Certain subpoenaed employees of the municipality could not appear due to illness or departure from employment. Those persons (Stone and Seymour) were acknowledged to be unavailable and not necessary to be heard. The testimony of no witness evidenced any conspiracy or independent act by any public official of the municipality to prosecute defendant for any reason other than the ordinance violations alleged. When subpoenaed by the defendant for the municipal court hearing, the police chief, one Haney, plausibly and credibly testified, I find, that he told the gentleman as a co-amateur radio enthusiast, "This is costing you money. I think you ought to go for a variance." Haney further intimated that the zoning officer considered Greenberg a gentleman and recourse to proper municipal variance procedures should be attempted by him. Nothing more can be spelled by this exchange, and certainly nothing from service of the within violations by a municipal police officer, rather than some other town employee.

Defendant has raised an equal protection clause argument. Specifically, there exists here a purposeful discrimination in the enforcement of these zoning ordinances. Has this enactment been used to discriminatorily harass defendant? There is a basic requirement to establishing non-prosecution of other violators. Here it has not been met. The Court cannot infer an intentional prosecutorial selectivity in the choice of this defendant, as no credible motive to supply such an inferential basis has been evidenced in this expanded record. There has been no proof satisfying to this Court that Cranford through its officials selectively prosecuted Mr. Greenberg. The friendly advices of the

municipal police chief, Haney, could only at best have been misunderstood or at worst wrenched out of context. The statistical evidence compiled is meager. Public utility poles of electrical and telephone companies as indicated are controlled by statute beyond the municipal zoning reach. N.J.S.A. 40:55D-19. Tower erection without building permits in non-residential areas on commercial structures or appurtenant thereto, erected by Fuel Oil Supply Company of 600 South Avenue, Cranford, New Jersey, and a refuse disposal company of one John Errico, do not evidence proof of knowledge or complicity by the township, in allowing radio towers to be erected on their property.

Zoning ordinances are to be liberally construed in favor of municipalities. Article IV, Section VII, Paragraph II, of the New Jersey Constitution. Leading zoning cases implement this principle. *Thornton v. Village of Ridgewood,* 17 *N.J.* 499 (1955); *Fischer v. Bedminster Township,* 21 *N.J. Super.* 81 (Law Div. 1952) aff'd 11 *N.J.* 194 (1952); *United Advertising Corp. v. Borough of Raritan,* 11 *N.J.* 144 (1952). If, as the defendant argues, the pertinent provisions of the Cranford Zoning Ordinance must be struck, he runs full into such authority.

Defendant contends that the zoning ordinance and building code as applied herein to home entertainment devices is an invalid use of Cranford's police power, in that regulation of such devices has been pre-empted by the Federal Communications Act of 1934, as amended, 47 U.S.C.A. §151 *et seq.* This same issue was raised and decided in a manner adverse to defendant in *Skinner v. Zoning Bd. of Adjust., Cherry Hill Tp.,* 80 *N.J. Super.* 380, 391-392 (App. Div. 1963). Therein the Court said, at p. 392: "Despite the federal regulation of radio communications, there arises problems dealing with amateur radio, often carried on in the amateur's home, which require for their proper solution through consideration of the particular area and surroundings. Regulation of these matters is properly left to local regulation without impairment of the national interest in

the matter. A zoning regulation is such a matter of local concern." Additionally, *Skinner* and *Wright v. Vogt*, 7 *N.J.* 1 (1951) make clear that no other factors prohibit a municipality from placing height limitations upon amateur radio antennas. Such antennas are classified as "an 'accessory use' within a residential zone . . ." *Skinner, supra*, at 383. Section 24-17(b) of the Cranford Zoning Ordinance provides: "In the residential zones no accessory building or structure which is accessory to a residential use shall exceed 16 feet in height." In view of *Wright* and *Skinner*, this appears a proper exercise of Cranford's police power, as applied to defendant herein.

Defendant further contends that the Court below improperly permitted an amendment of the charge from §114.0 of the Standard Building Code of New Jersey to §24-81(a) of the Cranford Zoning Ordinance. Defendant argues that this amendment lowered the State's burden of proof, in that §114.0 requires a showing of changed conditions, while §24-81(a) requires a showing of only changed or altered conditions. A reading of the sections involved defeats this argument. §114.0 provides: "It shall be unlawful to construct, enlarge, alter, remove or demolish or change the occupancy from one use group to another . . . without first filing an application with the building official in writing and obtaining the required permit therefore . . ." §24-81(a) provides: "No building or structure or part thereof shall be erected, raised, moved, extended, enlarged, altered or demolished until a permit has been granted . . ." The substance of these charges, and hence the State's burden of proof, is identical, and thus the amendment was proper under R.7:10-2. *See, State v. Blackman*, 125 *N.J. Super.* 124, 129-130 (App. Div. 1973).

Defendant inferentially argued a failure of the municipality to cooperate in providing records on file of the conduct of the zoning officer's activities within the municipality. The production of such documentary evidence, this Court is satisfied,

is one question but certainly on this record including the testimony presented on March 24th, it finds that such information by way of records is and was available to defendant throughout the litigation. Same should have been presented by direct testimony below by defendant's own witnesses if desired. N.J.S. 47:1(a)-2 requires such records be "keep on file by any Board . . . or of any political sub-division thereof." Further, this statute appears to present the burden of producing such evidence upon defendant in that "every citizen . . . during the regular business hours maintained by the custodian of any such records, . . . shall have the right to inspect such records." Finally, the citizen may copy or arrange to purchase copies of such records.

It is, of course, axiomatic that "an essential element necessary to the invocation of jurisdiction in criminal cases is that the crime be committed in the state in which the case is tried." *State v. McDowney*, 49 *N.J.* 471, 474 (1967). While the legislature has imbued the municipal court with the power to hear cases relating to "any premises or property situated or located partly within and partly without such municipality . . ." N.J.S.A. 2A:8-20, this does not confer power upon these Courts to enforce the ordinances of one municipality upon property situated within another. In fact, it is doubtful that, without specific statutory authority, a municipality has any legislative or police powers beyond its borders. *State v. Larsons*, 195 *N.W.*2d 180, 183 (Sup. Ct. of Minn. 1972); *Smeltzer v. Messer*, 225 *S.W.*2d 96, 97 (Ct. of App. of Ky. 1949). *See also, Newark v. Public Service Co-Ordinated Transport*, 9 *N.J. Misc.* 720, 725 (Sup. Ct. 1931), aff'd 109 *N.J.L.* 270 (E.&A. 1932), recognizing the power of a municipality to provide police protection "within its boundries." This principle, as applied to zoning ordinances, limits their enforcement to property located within the municipality. This appears to be the rule in every jurisdiction which has passed upon the question. Thus, in *Robinson v. City of Montgomery*, 233 *So.*2d 69, 70 (Sup. Ct. of Ala. 1970) the Court acknowledged that "In the absence of any enabling

legislation expressly providing otherwise, zoning enactments of a municipality are limited to its territorial boundries and are invalid to the extend that they seek to impose zoning regulation and restrictions on land outside city limits." *See also, Roosevelt v. City of Englewood,* 492 *P*2d 65, 70 (Sup. Ct. of Colo. 1971); *Lepenas v. Zoning Bd. of App. of Brockton,* 226 *N.E.*2d 361, 363 (Sup. Jud. Ct. of Mass. 1967); *State v. Larson, supra; Shles v. Town Council of Town of West Hartford,* 268 *A*2d 395, 404 (Sup. Ct. of Conn. 1970); *State v. Owens,* 88 *S.E.*2d 832, 834 (Sup. Ct. of N.C. 1955); *Sanders v. Snyder,* 178 *N.E.*2d 174 (Ct. of App. of Ohio 1960); *Smeltzer v. Messer, supra.* While the Cranford Municipal Court has jurisdiction to hear the matter as to the poles located within Kenilworth, N.J.S.A. 2A:8-20, it could not do so based upon the Cranford Zoning Ordinances. This is especially significant in light of defendant's uncontradicted contention that the Kenilworth Zoning Ordinance did not prohibit at least two of the poles at the time of their erection or emplacement. This Court is consequently left with the task of determining upon its findings of fact and conclusions of law, the sufficiency of penalties for the two poles at least within the Township of Cranford under its ordinances.

Ordinance §24-26 (presently 24-96) relating to penalties provides for a maximum penalty of $200.00 and/or 90 days in jail. It continues: "A separate offense shall be deemed committed on each day during which a violation occurs or continues." N.J.S.A. 40:49-5 was amended in 1968, permitting fines up to $500.00. Cranford as late as January 25, 1977, has opted to authorize less than this authorized penalty amount. Defendant contends that this "fractionalization" is improper, although no authority is cited in support of this contention. The Court has found none. It appears, however, that only one of the two offenses of which defendant was convicted below can reasonably be interpreted as being of a continuing nature. §24-81(a), failure to obtain a building permit, was violated by building without a permit. Such an ordinance can only be violated once. The fine

on that violation is fixed at $200.00. §24-17(b), accessory structures over 16 feet, is the type of ordinance which can be considered as violated every day the structure remains, and thus a review of this violation in terms of penalty imposed appears reasonable upon that record. Defendant apparently has made a thoughtful, calculated challenge of the municipality's zoning power. The poles were emplaced in July, 1975, and prosecution delayed while efforts at suggesting other process to resolve the residents actions were offered. Defendant chose not to take this avenue. The penalty does not appear punitive in nature but designed to require a choice by Greenberg. That choice having been elected, provision for further appeal is available.

The Court is not aware of any power under review of these convictions to mandate as required by the township that defendant remove the structures forthwith. Enforcement by the governing body appears to require steps be taken under N.J.S. 40:55D-18. No authority has been provided. Should defendant elect to further appeal, he has such right. Should he not, further action presumably can be considered by the municipality in the light of this opinion.

The Court having considered as indicated all the testimony and any arguments presented in writing filed with the Court on or before April 15th, an Order will be signed entering Judgment of Conviction in the amount of $1,000.00 and $200.00 respectively on each section violated. There shall also be affixed costs of $10.00 to be remitted to the Union County Clerk within ten days hereof.

Counsel should arrange to pick up all exhibits in view of the extent and nature of same upon arrangement with my clerk.

Opinion Letter

Dated: April 26, 1977

s/ John J. Callahan
JOHN J. CALLAHAN, J.D.C.
T/A

cc Stanley J. Kaczorowski, Esq.
Borough Prosecutor for Kenilworth

RELEVANT CITATIONS

New Jersery Court Rule 2:5-4(a)

"Record on Appeal

(a) Contents of Record. The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matter made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court."

Cranford Township Zoning Ordinance:

"Article 22. Violations.

24-96. Penalty.

(a) Any owner or agent, and any person or corporation who shall violate any of the provisions of this chapter or fail to comply therewith or with any of the requirements thereof or who shall erect, structurally alter, enlarge, rebuild, or move any building or buildings or any structure, or who shall put into use any lot or land in violation of any detailed statement or plan submitted hereunder, or who shall refuse reasonable opportunity to inspect any premises, shall be liable to a fine of not more than $200.00 or to imprisonment for not more than 90 days, or to both such fine and imprisonment. A separate offense shall be deemed committed on each day during or on which a violation occurs or continues."

Relevant Citations

New Jersey Statute Title 40:49-5

"Penalties for violating ordinances; maximum

The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, either by imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days, or by a fine not exceeding *$500.00* or both. The court before which any person is convicted of violating any ordinance of a municipality, shall have power to impose any fine or term of imprisonment not exceeding the maximum fixed in such ordinance."